

PREMIUM BALLOON
ACCESSORIES, INC.
3569 Ridge Road
Sharon Center, Ohio 44274

Relator/Plaintiff,

v.

CREATIVE BALLOON MFG., INC.
Bldg. A, Suite 201
200 Clocktower Plaza
Carmel, California 93923

Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

CASE NO.:

JUDGE:

**COMPLAINT FOR
FALSE PATENT
MARKING AND
UNFAIR COMPETITION**

JURY DEMAND
ENDORSED HEREON

Pat. # 1,663,498 4,167,204
4,167,204 3,994,324
D634,793
D634,792
D520,078
D359,229
D329,261

Relator/Plaintiff, Premium Balloon Accessories, Inc. ("Premium"), for its Complaint against Defendant, Creative Balloons Mfg., Inc. ("Creative"), alleges as follows:

PARTIES

1. Premium is an Ohio corporation, having its principal place of business at 6935 Ridge Road, Sharon Center, Ohio 44274.

2. Creative is, upon information and belief, a California corporation having its principal place of business at Bldg. A, Suite 201, 200 Clocktower Plaza, Carmel, California 93923.

JURISDICTION AND VENUE

3. The Court has jurisdiction of this action under 15 U.S.C. §1121, 28 U.S.C. §§1331, 1338(a) and 1367.

4. The Court has personal jurisdiction over Creative for the reason that Creative has

continuously conducted business within the state of Ohio. Creative has continuously offered for sale and sold, marked, and advertised the products that are the subject of the Complaint in the United States, the state of Ohio, and the Northern District of Ohio.

5. Venue is proper in this district under 28 U.S.C. §1391(b), §1391(c) and §1395(a).

COUNT I—FALSE PATENT MARKING

6. This is in part an action for false patent marking under Section 292 of the Patent Act (35 U.S.C. §292).

7. Premium has standing to bring its claim for false patent marking under Article III of the United States Constitution and 35 U.S.C. §292. Under the terms of the statute “any person” may bring an action for its enforcement. Premium brings this *qui tam* action on behalf of the United States of America against Creative.

8. Premium and Creative are competitors in the balloon accessories market.

9. Creative has in the past sold, and presently sells, a product known as the “E-Z Balloon Kit.” The “E-Z Balloon Kit” product is comprised of a cylinder and connecting fittings for balloon inflation. The connecting fittings for balloon inflation are separately identified as “E-Z Safety Seal Balloon Valves.”

10. Creative marks the E-Z Balloon Kit product packaging with U.S. Patent No. 1,663,498 (the “‘498 patent”). A true and correct copy of the ‘498 patent is attached hereto as Exhibit 1. Photographs of the packaging for and the contents of an E-Z Balloon Kit are presented in Exhibit 2.

11. The ‘498 patent is directed to a yarn spool, a product unrelated to the E-Z Balloon Kit.

12. The '498 patent expired on February 15, 1927.

13. Creative also marks the E-Z Balloon Kit product packaging with U.S. Patent No. 4,167,204 (the "'204 patent"). A true and correct copy of the '204 patent is attached as Exhibit 3.

14. While the '204 patent is directed to an "Apparatus for Inflating Toy Balloons", the '204 patent expired on September 11, 1997.

15. Creative also sells the "E-Z Safety Seal Valve" product apart from its "E-Z Balloon Kit" product. Photographs of E-Z Safety Seal Valves are presented in Exhibit 4.

16. Creative also marks its E-Z Safety Seal Valve product sold apart from its "E-Z Balloon Kit" product with the '204 patent number despite the fact that the '204 patent expired on September 11, 1997.

17. In 2011, Creative introduced a new product into the balloon accessory market which it calls the "Big Barrel" E-Z Safety Seal Valve. Photographs of a "Big Barrel" E-Z Safety Seal Valve are presented in Exhibit 5. A press release announcing Creative's new products, including the "Big Barrel" E-Z Safety Seal Valve is attached as Exhibit 6.

18. Creative is marking that new product with the '204 patent number, and the advertising for it includes the term "patent pending". An advertising brochure for the "Big Barrel" E-Z Safety Seal Valve is attached as Exhibit 7.

19. Upon information and belief, Creative would have had to make or have made a new mold to produce the "Big Barrel" E-Z Safety Seal Valve. Upon information and belief, making a new mold having a patent marking reflects a choice to include the patent marking.

20. Creative continues to mark the E-Z Balloon Kit product with an unrelated and an expired patent number, its E-Z Safety Seal Valve product with an expired patent number, and its newly introduced "Big Barrel" E-Z Safety Seal Valve product with an expired patent number, importing that the same are patented.

21. Each false marking on the E-Z Balloon Kit, E-Z Safety Seal Valve product and "Big Barrel" E-Z Safety Seal Valve product is likely to, or at least has the potential to discourage or deter consumers from using competing products.

22. Each false marking on the E-Z Balloon Kit, E-Z Safety Seal Valve product and "Big Barrel" E-Z Safety Seal Valve product is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.

23. Creative has wrongfully and illegally advertised patent rights which it does not possess and, as a result, has benefitted commercially and financially by maintaining false statements of patent rights.

24. Upon information and belief, Creative knows that marking its products with a false patent statement was and is illegal under Title 35 of the United States Code. Creative has experience in prosecuting patents, and secured the services of knowledgeable and experienced patent attorneys in that regard. Creative is the listed assignee on the face of at least seven U.S. patents, including D634,793, D634,792, D520,078, D359,229, D329,261, 4,167,204, and 3,994,324. Creative has experience in paying maintenance fees in a timely fashion and knows that patents expire. Creative has itself made accusations against at least Premium of false patent marking by marking a product with an expired patent number. Creative made the accusations against Premium before it introduced the "Big Barrel" E-Z Safety Seal Valve in 2011.

25. Upon information and belief, Creative knows that consumers tend to purchase patented products, and that patent marking deters competitors from commercializing competing products. Upon information and belief, Creative has actively sought patent protection over products at the time of bringing them to market, and has brought allegations of patent infringement against at least Premium.

26. Upon information and belief, Creative has falsely marked unpatented articles, or their packaging, with the word “patent”, or words or numbers importing the unpatented articles are patented, for the purpose of deceiving the public.

27. Upon information and belief, Creative has falsely marked unpatented articles, or their packaging, with the word “patent”, or words or numbers importing the unpatented articles are patented, to gain a competitive advantage in the balloon accessories market.

28. Upon information and belief, Creative has demonstrated a pattern of repeated false marking offenses which will be further evidenced in these proceedings, demonstrating intent to deceive.

29. Creative’s false marking of its products, coupled with its intent to deceive the public is injurious to the public, and to Premium.

30. Creative is liable to the United States and Premium for false marking under 35 U.S.C. §292(b).

COUNT II-UNFAIR COMPETITION

31. Premium reasserts the allegations set forth in Paragraphs 1 through 30 as if fully rewritten.

32. The marking of an expired patent is a commercial advertising or promotion that

misrepresents the nature and characteristics of Creative's "E-Z Balloon Kit" product.

33. Creative also identifies the term "E-Z Balloon Kit" found on the product packaging of same name as a federally registered trademark.

34. Upon information and belief, the term "E-Z Balloon Kit" cannot be found on the federal register.

35. Creative also identifies the term "Yankee Doodle Dandy" found on its E-Z Balloon Kit product packaging as a federally registered trademark.

36. The federal trademark registration for the term "Yankee Doodle Dandy" for "combination regulator, cylinder and connecting fittings for balloon inflation" was cancelled on January 8, 2005. A copy of the USPTO's Trademark Electronic Search System record for "Yankee Doodle Dandy" is attached as Exhibit 8.

37. Creative also identifies the term "The Character of America" found on its E-Z Balloon Kit product packaging as a federally registered trademark.

38. The federal trademark registration for the term "The Character of America" found on Creative's E-Z Balloon Kit product packaging was cancelled on January 8, 2005. A copy of the USPTO's Trademark Electronic Search System record for "The Character of America" is attached as Exhibit 9.

39. The false marking of a registered trademark is also a commercial advertising or promotion that misrepresents the nature and characteristics of Creative's "E-Z Balloon Kit" product.

40. As a competitor in the market for balloon accessories, Premium is likely to be harmed by this misleading representation of facts regarding the "E-Z Balloon Kit" product.

41. Creative, through its intentional false marking, wrongfully and illegally advertised patent and trademark rights that Creative does not possess, and as a result, has benefitted commercially and financially while harming competition.

PRAYER FOR RELIEF

WHEREFORE, Premium requests judgment against Creative as follows:

A. A determination that Creative has violated 35 U.S.C. §292 by falsely marking its “E-Z Balloon Kit” product with an unrelated patent number and an expired patent number for the purpose of deceiving the public;

B. A determination that Creative has violated 35 U.S.C. §292 by falsely marking its “E-Z Seal Safety Valve” product with an expired patent number for the purpose of deceiving the public;

C. A determination that Creative has violated 35 U.S.C. §292 by falsely marking its “Big Barrel” Seal Safety Valve product with an expired patent number for the purpose of deceiving the public;

D. An order that Creative be fined up to \$500 per false marking “offense,” one-half of which shall go to Premium and the other to the United States.

E. An order preliminarily and permanently enjoining Creative and all of its officers, agents, servants, employees, contractors, suppliers, and attorneys, and all other persons who are in active concert or participation with them or who receives actual notice of the order by personal service or otherwise, from committing new acts of false marking and ceasing all existing acts of false marking within ninety (90) days;

F. A determination that Creative has violated Section 43(a) of the Lanham Act, and an order finding Creative liable for the violation and an award under 15 U.S.C. §1117 of its profits, Premium's damages, and an enhancement of such award, and the costs of this action;

G. An award in favor of Premium and against Creative for the costs incurred by Premium in bringing and maintaining this action, including reasonable attorneys' fees; and

H. Such other and further relief as the Court deems necessary and appropriate under the law or in equity.

JURY DEMAND

Premium demands a trial by jury for all issues so triable.

s:/Ray L. Weber

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